

CASES 05-C-0170 and 05-C-0183

3. These proceedings are continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary



BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2005-67-C - ORDER NO. 2005-233

MAY 23, 2005

IN RE: Petition of MCImetro Access Transmission)	ORDER DENYING AND
Services, LLC for Arbitration with Farmers)	DISMISSING PETITION
Telephone Cooperative, Inc., Hargray)	TO INTERVENE
Telephone Company, Home Telephone Co.,)	
Inc. and PBT Telecom, Inc. under the)	
Telecommunications Act of 1996.)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on a letter from Farmers Telephone Cooperative, Inc., Home Telephone Company, Inc., PBT Telecom, Inc., and Hargray Telephone Company (collectively, the RLECs) in opposition to a Petition to Intervene in this Docket filed by Time Warner Cable Information Services, LLC (TWCIS or Time Warner). The RLECs request that the Commission deny TWCIS' request to intervene in this docketed arbitration proceeding between MCImetro Access Transmission Services, LLC (MCI) and the individual RLECs. The Petition to Intervene is denied and dismissed, pursuant to the discussion and reasoning below.

The RLECs note that arbitration proceedings filed pursuant to Section 252 of the Telecommunications Act of 1996 (the Act) are not like the typical contested cases that the Commission presides over pursuant to the South Carolina Administrative Procedures Act (the APA). Instead, arbitration proceedings are a method used by two parties who have been unable to come to an agreement through negotiation. Arbitration proceedings are conducted by the Commission to assist the parties in resolving the differences they

have identified through the negotiation process in order to reach a final agreement between the parties. In other words, according to the RLECs, they are the culmination of the negotiation process contemplated under Sections 251 and 252 of the Act. Arbitration proceedings relate to a particular agreement and to the particular parties to that agreement. The RLECs state the belief that the fact that a third party may be interested in the issues or as TWCIS asserts, be interested in the final agreement itself, does not mean that those third parties should be permitted to participate in an arbitration proceeding. The negotiation process has taken place without Time Warner's involvement and, according to the RLECs, it would not be appropriate to interject TWCIS in the middle of the process now.

Further, the RLECs point out that the Commission has previously denied a Petition to Intervene filed by the Consumer Advocate in an arbitration proceeding. See Order No. 96-715 in Docket No. 96-262-C (BellSouth/ACSI Arbitration). Since the Consumer Advocate had a unique statutory role, the Commission did permit the Consumer Advocate to observe the proceedings, submit non-binding questions to the Arbitrator, and make opening and closing statements in the proceeding. However, the Commission specifically denied the Consumer Advocate's request to be granted intervenor status as a party of record. The RLECs point out that there is no unique statutory role to be filled by Time Warner in this case, but that Time Warner is merely a potential future customer of MCI in the service areas of the RLECs with whom MCI is seeking interconnection agreements. Therefore, under the RLECs' theory, Time Warner should not be permitted even to play a limited role in the resolution of this matter.

TWCIS, of course, takes a different view of the matter. Time Warner states that the South Carolina Administrative Procedures Act (APA) applies to this proceeding by definition, in that this case is a “contested case” under that Act. The APA states that a “contested case” is a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing.” S.C. Code Ann. Section 1-23-310(3). According to Time Warner, there is an existing contractual relationship between TWCIS and MCI which provides that MCI carry TWCIS’ traffic over the public switched telephone network. Also, Time Warner states that TWCIS’ legal rights will be directly affected by the decisions made during this proceeding, and that the decisions will directly impact TWCIS’ provisioning of services to its customers in the ILECs service area.

TWCIS states that it has a unique status in relation to this arbitration, in that it has an established agreement with MCI which will be directly affected by the decisions made in this proceeding. Lastly, Time Warner states that if it is not allowed to intervene, it will be substantially prejudiced by the administrative process. TWCIS states that one of the primary issues in dispute is whether MCI will be able to provide wholesale services to TWCIS. TWCIS notes that South Carolina recognizes that third party beneficiaries have rights in contracts created for their benefit, and that the disposition of this arbitration may as a practical matter impair or impede TWCIS’ ability to protect its interest in the current agreement with MCI. We understand the arguments proffered by TWCIS, but we agree with the position taken by the RLECs. The Petition to Intervene filed by TWCIS must be denied and dismissed.

Clearly, TWCIS is not a party to the agreement to be arbitrated, and has therefore not been a participant in the negotiation process contemplated by Sections 251 and 252 of the Telecommunications Act of 1996. Arbitration proceedings, pursuant to the Telecommunications Act of 1996 are not like the typical contested cases that the Commission presides over pursuant to the APA. We agree with the RLECs that arbitration proceedings are a method used by two parties who have been unable to come to an agreement through negotiation. An arbitration proceeding is clearly the culmination of the negotiation process contemplated under Sections 251 and 252. Arbitration proceedings relate to a particular agreement and to the particular parties to that agreement. We disagree with TWCIS that its particular interest gives them the right to intervene as a party of record in this case. Accordingly, the Petition to Intervene is denied and dismissed. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

/s/
Randy Mitchell, Chairman

ATTEST:

/s/
G. O'Neal Hamilton, Vice-Chairman

(SEAL)



STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE ARBITRATION OF:
SPRINT COMMUNICATIONS COMPANY L.P.,
Petitioning Party,

vs.

ACE COMMUNICATIONS GROUP, CLEAR LAKE
INDEPENDENT TELEPHONE COMPANY, FARMERS
MUTUAL COOPERATIVE TELEPHONE CO. OF SHELBY,
FARMERS TELEPHONE COMPANY, FARMERS MUTUAL
TELEPHONE COMPANY, GRAND RIVER MUTUAL
TELEPHONE CORPORATION, HEART OF IOWA
COMMUNICATIONS COOPERATIVE, HEARTLAND
TELECOMMUNICATIONS COMPANY OF IOWA d/b/a
HICKORYTECH, HUXLEY COMMUNICATIONS, IOWA
TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA
TELECOM f/k/a GTE MIDWEST, KALONA COOPERATIVE
TELEPHONE, LA PORTE CITY TELEPHONE COMPANY,
LEHIGH VALLEY COOPERATIVE TELEPHONE
ASSOCIATION, LOST NATION-ELWOOD TELEPHONE
COMPANY, MINBURN TELECOMMUNICATIONS, INC.,
ROCKWELL COOPERATIVE TELEPHONE
ASSOCIATION, SHARON TELEPHONE, SHELL ROCK
TELEPHONE COMPANY d/b/a BEVCOMM c/o BLUE
EARTH VALLEY TELEPHONE COMPANY, SOUTH
CENTRAL COMMUNICATIONS, INC., SOUTH SLOPE
COOPERATIVE TELEPHONE COMPANY, SWISHER
TELEPHONE COMPANY, VAN BUREN TELEPHONE
COMPANY, INC., VENTURA TELEPHONE COMPANY,
INC., VILLISCA FARMERS TELEPHONE COMPANY,
WEBSTER CALHOUN COOPERATIVE TELEPHONE
ASSOCIATION, WELLMAN COOPERATIVE TELEPHONE
ASSOCIATION, and WEST LIBERTY TELEPHONE
COMPANY d/b/a LIBERTY COMMUNICATIONS,

Responding Parties.

DOCKET NO. ARB-05-2

ORDER GRANTING MOTIONS TO DISMISS

(Issued May 26, 2005)

PROCEDURAL HISTORY AND BACKGROUND

On March 31, 2005, Sprint Communications Company L.P. (Sprint) filed a petition with the Utilities Board (Board) requesting arbitration of certain terms and conditions of a proposed interconnection agreement between Sprint and several rural incumbent local exchange carriers,¹ hereinafter referred to as the RLECs. The petition was filed pursuant to § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 101-104, 110 Stat. 56 (1996) (hereinafter referred to as the "Act"). Although there are 27 individual interconnection agreements that underlie this arbitration petition, the unresolved issues are identical for each individual RLEC. Sprint filed one petition for arbitration and asked that the Board treat the filing as a consolidated petition for arbitration with respect to each RLEC identified and consider the issues in one docket. On April 12, 2005, the Board granted that request and identified the matter as Docket No. ARB-05-2.

On April 13, 2005, Heartland Telecommunications Company of Iowa, d/b/a HickoryTech (Heartland), filed a motion to dismiss Sprint's petition as not timely.

¹ Ace Communications Group, Clear Lake Independent Telephone Company, Farmers Mutual Cooperative Telephone Co. of Shelby, Farmers Telephone Company, Farmers Mutual Telephone Company, Grand River Mutual Telephone Corporation, Heart of Iowa Communications Cooperative, Heartland Telecommunications Company of Iowa d/b/a HickoryTech, Huxley Communications, Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom f/k/a GTE Midwest, Kalona Cooperative Telephone, La Porte City Telephone Company, Lehigh Valley Cooperative Telephone Association, Lost Nation-Elwood Telephone Company, Minburn Telecommunications, Inc., Rockwell Cooperative Telephone Association, Sharon Telephone, Shell Rock Telephone Company d/b/a BEVCOMM c/o Blue Earth Valley Telephone Company, South Central Communications, Inc., South Slope Cooperative Communications Company, Swisher Telephone Company, Van Buren Telephone Company, Inc., Ventura Telephone Company, Inc., Villisca Farmers Telephone Company, Webster Calhoun Cooperative Telephone Association, Wellman Cooperative Telephone Association, and West Liberty Telephone Company d/b/a Liberty Communications.

Heartland alleges that Sprint's petition was filed on March 31, 2005, but that Sprint has admitted that the "window" for filing for arbitration under the act does not open until May 4, 2005. In support of this statement, Heartland attaches two letters it received from Sprint in February and March of 2005, in which Sprint indicates that the window for arbitration will open on May 4, 2005, and close on May 31, 2005.

On April 15, 2005, the RLEC Group² filed a motion to dismiss and a response to the petition. The RLEC Group moves to dismiss because, it argues, Sprint is not a competitive local exchange carrier, or CLEC, that is authorized to provide local exchange service in any of the exchanges served by the RLEC Group. The RLEC Group also asserts that the petition should be dismissed because Sprint is not a "telecommunications carrier" within the meaning of § 153(44) of the Act because Sprint does not provide, or intend to provide, local exchange service to end-users in any of the RLEC Group exchanges.

The RLEC Group also asserts that the Sprint petition is untimely and should therefore be dismissed. The RLEC Group points out that Sprint's original requests for negotiation stated that the date of the notices, October 20, 2004, "shall serve as the starting point for the one hundred thirty-five (135) day negotiation window under Section 252." Counting days from October 20, 2005, the RLEC Group alleges that the arbitration window closed March 29, 2005, so the petition missed the window.

Finally, the RLEC Group points to Sprint's letters of February 15 and March 23, 2005, in which Sprint represented the arbitration window as being from

² Being all of the RLECs except Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom.

May 4 to May 31, 2005. The RLEC Group asserts its members have been prejudiced by the filing of the petition in advance of that window because "[t]his matter could have been resolved during the month of April with some time for contract discussions, if the arbitration window was open in accord with the Sprint letter." (RLEC Group motion to dismiss at page 7.)

Also on April 15, 2005, Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom), filed a motion to dismiss and response to the petition for arbitration. The Iowa Telecom motion is substantially similar to the RLEC Group motion.

On April 19, 2005, Sprint filed a response to the Heartland motion to dismiss, pointing out that § 252(b)(1) of the Act provides that either party to a proposed interconnection agreement may petition a state commission for arbitration during the period from the 135th to the 160th day, inclusive, after the date on which the incumbent local exchange carrier received the request for negotiation. Attached to Sprint's response is an overnight mail receipt showing that Heartland received Sprint's request for negotiations on October 22, 2004, so pursuant to statute the arbitration window was open from March 4, 2005, through March 31, 2005. Sprint admits that its letters of February 18 and March 23, 2005, inadvertently substituted the word "May" for "March" when reciting these dates, but asserts Heartland was not prejudiced by this error.

On April 26, 2005, Sprint filed a response to the motions to dismiss filed by Iowa Telecom and the RLEC Group. With regard to the timeliness issue, Sprint

makes the same response as it made to Heartland: The requests were received by the companies on October 22, 2005, so the last day to request arbitration was March 31, 2005, the date that Sprint filed its petition. As to the typographical errors in the letters of February 18 and March 23, 2005, Sprint asserts that the RLECs were not prejudiced by the error because they were not negotiating with Sprint at any time, so they cannot credibly claim that the matter might have been resolved by negotiations during the month of April.

As to the other issues raised by the RLEC Group and Iowa Telecom motions to dismiss, Sprint asserts that it is a telecommunications carrier offering telecommunications service under § 153(44) and § 153(46) of the Act because MCC Telephony of Iowa, Inc. (MCC), will be the "customer-facing" retail provider of local exchange services in the RLEC exchanges while Sprint will be providing interconnection and other telecommunications services to MCC. Sprint points out that § 153(46) of the Act defines "telecommunications services" as the "offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used." Sprint argues that its proposed services fall within this definition.

Sprint also argues that its status as a certificated CLEC in any of the movants' exchanges is not dispositive of the issue of whether Sprint has a right to interconnect pursuant to §§ 251(a) and (b) of the Act. Sprint argues it is a local exchange carrier by virtue of providing "telephone exchange service" as defined in § 153(47) of the Act because Sprint will be providing local exchange service through its arrangements

with MCC and other providers. Thus, the end-users, or subscribers, will not subscribe directly with Sprint, but Sprint's switches, transmission equipment, and other facilities will be used by the subscribers to complete calls.

On April 29, 2005, the RLEC Group, Iowa Telecom, and Sprint all filed briefs in support of their positions regarding the motions to dismiss. The briefs expand on the respective positions of the parties, as described above, but for purposes of this order a separate summary of the briefs is not required. The cases and other authorities relied upon in the briefs will be discussed in the Board's analysis as relevant.

SUMMARY OF ARGUMENTS AND BOARD DISCUSSION

ISSUE ONE: Whether Sprint's petition is timely.

RLEC Position: In all the notices attached to Sprint's March 31, 2005, petition for arbitration, the date of the bona fide request was shown as October 20, 2004. The RLECs maintain that, based on the initial representations of Sprint as to the starting date of the 135-day negotiation window under Section 252, the window was open on March 4, 2005, and closed on March 29, 2005.

The RLECs also provide letters from Sprint representing that the arbitration window would open on May 4, 2005, and close on May 31, 2005. The RLECs state they relied upon the representation of the arbitration window made by Sprint in these letters. According to the RLECs, the issue is whether Sprint can represent that varying dates will apply, but be bound by none of them.

Sprint's Position: The Act clearly states that the arbitration window consists of the period from the 135th to the 160th day (inclusive) after the date on which an

incumbent local exchange carrier receives a request for negotiation. Sprint provides copies of overnight mail receipts for each of the 25 members of the RLEC Group indicating they received Sprint's request for interconnection on October 22, 2004. Sprint filed its petition on March 31, 2005, the 160th day of the window. Sprint acknowledges it erroneously quoted the arbitration window as May 4 through May 31, 2005, in two letters to the RLECs. Sprint states the error was inadvertent, and upon discovery of the error, Sprint contacted counsel for the RLECs to correct this error. Nonetheless, Sprint states the error does not relieve the RLECs of their own responsibility to keep track of the statutory arbitration window.

Board Discussion: The Board will deny the motions to dismiss based on the allegation that Sprint's petition was untimely filed with the Board. In this respect, the Act is clear. The window for requesting arbitration is to be calculated from the date the request for negotiations was received by the incumbent local exchange carrier. The RLECs received the requests on October 22, 2004, and Sprint's petition was therefore filed in a timely manner. Moreover, Sprint's unilateral³ (and inadvertent) mis-statement of those dates cannot change the statute, at least in the absence of some showing of prejudice to the other parties. Here, the RLEC Group, Heartland, and Iowa Telecom have claimed prejudice, arguing that if the arbitration window had really been in May, they might have negotiated an interconnection agreement with

³ The Board is aware that the parties to § 252 proceedings often, by agreement, designate a different date for the receipt of the request, and therefore extend the negotiating period beyond 160 days, but there is no provision for either party to do so unilaterally.

Sprint during April, but this argument assumes that the parties were negotiating in the first place. Instead, it appears that little or no negotiation took place between October of 2004 and March of 2005, making it reasonable to believe that there would have been no negotiations in April, either.

The motions to dismiss the petition based upon the date of filing are denied.

ISSUE TWO: Whether the RLECs have a duty to establish interconnection agreements with Sprint.

Iowa Telecom and RLEC Group Position: Sprint represents in its petition that it will be providing facilities-based competitive services, but it is clear that MCC is the local exchange carrier which will be responsible for providing local exchange services to the public. Sprint's role is that of a wholesaler providing contract services for MCC.

A necessary condition for an entity to assert rights under §§ 251(a), (b), and (c) of the Act is that it must be a "telecommunications carrier" pursuant to § 153(44) of the Act. Section 153(44) defines "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in Section 226)." Section 153(46), in turn, defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Because Sprint itself would offer no service to the public and would have no direct relationship with any end-user whose traffic would be exchanged under the proposed interconnection agreements, for the

purposes of this proceeding Sprint is not a telecommunications carrier and does not offer telecommunications service. Thus, the petition should be dismissed.

Even if Sprint were a "telecommunications carrier" under the Act, it would have no right to demand an interconnection agreement pursuant to § 251(b) of the Act, which is reserved only for local exchange and Commercial Mobile Wireless Service (CMRS) providers. Pursuant to § 153(26) a local exchange carrier is an entity "engaged in the provision of telephone exchange service or exchange access." Sprint's Iowa tariff defines its exchange area to include only the exchanges of Qwest Corporation. Authority to provide service in Qwest's exchanges as a CLEC does not give Sprint any right to insist on a local interconnection agreement with RLECs in other exchanges. Because Sprint is not authorized to provide exchange service beyond the exchanges of Qwest, the service Sprint proposes to offer does not qualify as telephone exchange service or exchange access service.

Sprint's Position: The motions to dismiss state that since Sprint is not a CLEC authorized to provide service in any of the exchanges of the RLECs, Sprint has no right to insist on a local interconnection agreement with the RLECs. Sprint argues that its status as a certificated CLEC in the RLEC exchanges is not determinative of interconnection rights under §§ 251(a) and (b) of the Act. Sprint's right to interconnection under § 251 is established by Sprint's status as a "telecommunications carrier" providing "telecommunications services" pursuant to §§ 153(44) and 153(46) of the Act. It is not necessary for Sprint to be a certificated

CLEC in any of the LEC's exchanges in order for it to be entitled to interconnection rights under § 251.

Federal law does not require CLEC certification as a pre-condition for interconnection. Instead, it allows for variations in how telecommunications services may be provided. This flexibility is demonstrated by the different requirements for CLEC certification in various states. For example, Iowa requires Board approval of a retail tariff before granting CLEC status. However, in other states, Sprint has received statewide CLEC status for the purpose of providing interconnection services to cable companies like the arrangement Sprint is proposing with MCC in Iowa. CLEC status is not a blanket requirement for interconnection under § 251 of the Act.

The RLECs allege that only local exchange and CMRS providers are eligible to assert interconnection rights under § 251(b). This is contrary to the FCC's ruling regarding the provision of directory listing information under the Act.⁴ In that case, the FCC held that a directory assistance provider's provision of "call completion" service entitles the provider to nondiscriminatory directory assistance database access under § 251(b)(3), regardless of whether the provider is certified by the state as a CLEC.

In addition, even if it were true that only local exchange and CMRS providers are eligible to assert rights under § 251(b), Sprint is a local exchange carrier⁵ by

⁴ Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended, CC-Docket No. 99-273, First Report and Order, 2001 FCC Lexis 473, para. 15-18 (rel. 1-23-01).

⁵ Section 153(26) provides that the term "local exchange carrier" means any person that engages in the provision of telephone exchange service or exchange access.

virtue of providing "telephone exchange service" within the meaning of the Act.

Sprint's provision of service to MCC will enable MCC customers to originate and terminate local telephone calls. This falls squarely within the definition of telephone exchange service under § 153(47).⁶

Because Sprint is providing "telephone exchange service" pursuant to § 251(b), Sprint is also entitled to local number portability parity pursuant to § 251(b)(2) and dialing parity pursuant to § 251(b)(3). Additionally, pursuant to § 251(b)(5) Sprint is entitled to reciprocal compensation arrangements for transport and termination of telecommunications traffic by nature of its status as a "telecommunications carrier."

Board Discussion: The Board will grant the motions to dismiss based on Sprint's status. The key language in § 153(46), providing that a telecommunications carrier must offer "telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public," is not as clear as the statutory language relevant to the first issue, above. However, as the parties have pointed out in their briefs, this statutory definition has been the subject of interpretation by the Federal Communications Commission (FCC) and the courts. These bodies have interpreted the definition to require that a "telecommunications

⁶ Section 153(47) provides that the term "local exchange carrier" means A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

carrier" can be either a retail or wholesale provider, but it must be a common carrier. Based on those interpretations, Sprint is not a "telecommunications carrier" in these exchanges for purposes of invoking the negotiation and arbitration procedures of § 252 of the Act because it is not, in this context, holding itself out as a common carrier.

The most relevant case is Virgin Islands Telephone v. FCC, 198 F.3d 921 (D.C. Cir. 1999), in which the court reviewed an FCC order granting AT&T Submarine Systems, Inc. (AT&T-SSI), rights to land an undersea cable even though AT&T-SSI was not a common carrier. In reviewing the AT&T-SSI application, the FCC determined that AT&T-SSI was not a "telecommunications carrier" under the Act because it would not function as a common carrier. AT&T-SSI proposed to offer its services to retail telecommunications carriers and relied upon the retail service offerings by its wholesale customers in claiming it was, itself, a telecommunications carrier, much like Sprint is relying on the proposed retail service offerings of MCC to support Sprint's claim to be a telecommunications carrier. The FCC rejected AT&T-SSI's arguments, and the court affirmed.

In its own analysis of the Virgin Islands decision, Sprint points out that the FCC's order in that case observed that the Act's definition of "telecommunications service" includes wholesale services to other carriers. (Sprint brief at page 9.) In other words, the FCC's focus, and therefore the reviewing court's focus, was not on the question of whether AT&T-SSI was a retailer or a wholesale; instead, it was on the question of whether AT&T-SSI was a common carrier or a private carrier. Thus,

the FCC's order and the court's decision "minimize the distinction between 'directly to the public' and 'effectively available directly to the public'...." (Sprint brief at page 8.) The Board agrees that the FCC and the Virgin Islands Court did not adopt a wholesale/retail distinction in interpreting the language of the statute. However, the FCC's interpretation, affirmed by the court, distinguishes between common carriers and private carriers and determined that a "telecommunications carrier" under the Act must be a "common carrier." That term, in turn, is defined by a two-pronged test: First, whether the carrier holds itself out to serve all potential users indifferently and second, whether the carrier allows customers to transmit information of the customer's own design and choosing. United States Telecom Ass'n v. FCC, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (hereinafter USTA), citing National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976).

In this proceeding, it is clear that Sprint does not intend to offer its proposed service in the RLEC exchanges to any party other than its private business partners, pursuant to individually-negotiated contracts. At no point in this proceeding has Sprint asserted that it will make its proposed services available on a common carrier basis. Thus, Sprint cannot satisfy the first prong of the NARUC 1 test, is not a common carrier (in this respect), and therefore is not a "telecommunications carrier" under § 153(46) as interpreted by the Virgin Islands Court and the FCC.⁷

⁷ The test for determining whether a carrier is a "common carrier" is analyzed in some detail in the USTA decision. The key question for purposes of this case appears to be whether in these RLEC exchanges Sprint will hold itself out indiscriminately to serve all within the class of potential customers. USTA, 295 F.3d at 1329-30, citing various FCC decisions. Again, there is nothing in Sprint's petition to demonstrate that it will serve all customers on the same terms and conditions; instead, it appears

The parties refer to a number of other decisions in support of their respective positions, but none of them are as directly relevant to this matter as the decisions summarized above. For example, the RLEC Group refers to the Board's recent order in Re: Level 3 Communications, LLC, Docket No. TF-05-31 (TCU-99-1), for the proposition that the Board distinguishes carriers that offer service to the public from carriers who limit service to business partners. (RLEC Group brief at 8.) However, that order was concerned only with Iowa Code § 476.29, which makes a clear distinction between retail and wholesale services; it is not directly relevant to interpretation of the federal statutes at issue here.

This distinction is also reflected in the Board's decision in Re: Intrado Communications, Inc., Docket No. TCU-02-1, "Order Denying Application For Certificate (Without Prejudice)" (issued March 15, 2002), in which the Board determined that certification pursuant to Iowa Code § 476.29 is not a prerequisite to being considered a telecommunications carrier under the Act. In Intrado, the carrier proposed to offer a wholesale 911 emergency call-related service to any local exchange carrier that wanted it. This was sufficient to qualify the company as a common carrier and therefore a telecommunications carrier under the Act. The fact that the carrier was not eligible for a § 476.29 certificate was irrelevant.

Sprint cites the Board to a decision of the Public Utilities Commission of Ohio, In the Matter of the Application and Petition in Accordance with Section II.A.2.b of the

Sprint intends to negotiate separately with each potential customer, to the extent it has customers other than MCC.

Local Service Guidelines Filed by: The Champaign Telephone Company, et al.,

Case No. 04-1494-TP-UNC *et seq.*, "Finding And Order" (issued January 26, 2005) and the associated "Order On Rehearing" issued April 13, 2005. In that case, which involved an ILEC assertion of rural exemption status under the Act, the Ohio commission concluded that MCI was a "telecommunications carrier" under the Act when it had made arrangements to provide services to Time Warner, which would then make those services available to the public. Sprint argues that it is in the same position in Iowa, as an "intermediate carrier."

The Ohio commission's decision appears to be based solely on the language of the Act, without reference to the FCC and court decisions interpreting the statute. In particular, the decision makes no mention of the D.C. Circuit's Virgin Islands decision and the FCC rulings reviewed therein. Thus, the Ohio decision never addresses the question of whether MCI is proposing to operate as a common carrier. For this reason, the Board finds the Champaign order to be of little help in this proceeding.

Moreover, the Board notes that in the Ohio proceedings, MCI represented to the commission that it would "submit order to Applicants on Time Warner's behalf..." This language implies an agency relationship between MCI and Time Warner that, on this record, does not exist between Sprint and MCC. That is, Sprint does not seek to negotiate and, if necessary, arbitrate an interconnection agreement on MCC's behalf; instead, it seeks an interconnection agreement in its own name, which it will then use

to handle traffic from customers of MCC and, potentially, other telecommunications carriers that do not have their own interconnection agreements with the RLECs.

This is a significant distinction between the Ohio decision and the case before the Board. It appears that if Sprint had sent the RLECs a request for negotiations on behalf of MCC, the RLECs would have been required to participate in the § 252 negotiation and arbitration process. By seeking an agreement in its own name, in contrast, Sprint removed these negotiations from the § 252 process. This decision may have had a legitimate business purpose from Sprint's point of view, but the difference may be more than a technicality to the RLECs; the compensation that may be owed by one party to an interconnection agreement to the other party can depend upon where the calls originated, what type of carrier they originated with, and other factors. If the RLECs have separate interconnection agreements with each telecommunications carrier providing service in their exchanges, they may have a better chance of correctly identifying and classifying the traffic they receive and therefore that the compensation they pay or receive is correct.

It is possible that this issue might have been resolved during negotiation and arbitration, if the parties had chosen to pursue that option. The Board believes the RLECs could have waived their objection to negotiating and arbitrating with Sprint in these circumstances, but the Act did not require them to do so.

The result of the RLECs' refusal to negotiate with Sprint is that MCC's entry as a competitor in the RLEC exchanges will be delayed while Sprint (or MCC) submits a new request and starts the process over. On its face, this result may appear to be

contrary to the public's interest in having a choice of telecommunications service providers as soon as possible. However, it would be even worse if the Board were to deny the motion to dismiss and invest time and resources in arbitrating an interconnection agreement between Sprint and the RLECs, only to be reversed in court because of a lack of jurisdiction under the Act.

Moreover, when the parties start over, they will be able to actually negotiate regarding the appropriate terms and conditions of their interconnection agreements. No such negotiations have taken place to date. The Board believes it will be beneficial if the negotiations process required by § 252(b)(5) is pursued before arbitration begins.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The "Motion to Dismiss Petition for Arbitration as Not Timely" filed by Heartland Telecommunications Company of Iowa, d/b/a HickoryTech, on April 13, 2005, is denied.
2. The motions to dismiss filed by the RLEC Group and Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, on April 15, 2005, are granted in part and denied in part. The motions are denied with respect to the assertions that the petitions for arbitration filed in this docket on March 31, 2005, were not timely filed. The motions are granted with respect to the assertions that Sprint Communications Company, L.P., is not a "telecommunications carrier" within

the meaning of § 153(44) of the Act in the RLEC exchanges and therefore does not have the right to invoke the compulsory arbitration process under § 252 of the Act.

3. Docket No. ARB-05-2 is closed.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 26th day of May, 2005.